

PROPOSED RULEMAKING

DELAWARE RIVER BASIN COMMISSION

[25 PA. CODE CH. 901]

Amendment to the Basin Regulations—Water Supply Charges and Comprehensive Plan Relating to Certificates of Entitlement

The Delaware River Basin Commission (Commission) will hold a public hearing to receive comments on proposed amendments to the Commission's *Basin Regulations—Water Supply Charges and Comprehensive Plan* concerning certificates of entitlement. No changes in the substance or administration of the rule are proposed. The purpose of the proposed amendments is to clarify the language of the rule to conform to the Commission's past decisions and current practices in order to provide better notice to users as to how the Commission is implementing its entitlements program and to avoid future controversy.

Supplemental Information

The Delaware River Basin Compact (Compact), the 1961 statute that created the Commission and defined its powers, authorizes the Commission to charge for the use of facilities that it may own or operate and for products and services rendered thereby. Compact, § 3.7. Congress limited this authority by providing that the Commission cannot charge for water withdrawals or diversions that could lawfully have been made without charge as of the effective date of the Compact. Id., § 15.1(b).

By Resolution No. 64-16A in 1964 the Commission authorized a water charging program. It provided for the revenues generated by the program to be used for repayment of the nonfederal share of the investment cost of water supply storage facilities associated with federal projects within the Basin. In anticipation of Commission investment in storage at the Beltzville Lake and Blue Marsh Reservoir projects in Pennsylvania, the Commission by Resolution No. 1971-4 defined, among other things, the means by which it would establish water charging rates. Consistent with § 15.1(b) of the Compact, Resolution No. 1971-4 provided that charges would be applicable only to the amount of water withdrawn in excess of the amount taken or legally entitled to be taken by an entity during the preceding year. By Resolution No. 74-6, the Commission instituted a system of water supply charges for surface water withdrawals within the Basin. That resolution provided for the issuance of certificates of entitlement to then-current water users, establishing the amount of water each could lawfully take from the surface waters of the Basin without charge, consistent with § 15.1(b) of the Compact. The resolution provided that a certificate of entitlement was not transferable, except under limited circumstances set forth in enumerated exceptions.

Because entitlements treat users that commenced water withdrawals before the enactment of the Compact more favorably than users who commenced water withdrawals later, even though all users benefit equally from the facilities financed by water supply charges, courts and the Commission have emphasized the need to eliminate entitlements over time. Both the Commission and the courts have construed narrowly the exceptions to the rule that entitlements are not transferable, and the Commission

has in its decisions consistently held that changes in ownership or control would extinguish a certificate. However, the language of the regulations has never explicitly defined "changes in ownership or control." As a consequence, in the decisions that the Commission has been asked to make in its adjudicatory capacity and that the courts have subsequently been asked to decide, the matter of what constitutes a change of ownership or control has been controversial.

In 1994, in response to a ruling by the Third Circuit in *Texaco Refining and Marketing, Inc. v. DRBC*, 824 F. Supp. 500 (D.Del. 1993), aff'd., No. 93-7475 (3d Cir. June 24, 1994) (per curiam), the Commission adopted Resolution No. 94-20. That resolution incorporated an explicit "ownership and/or control" test and eliminated the merger exception included in the Commission's regulations at the time. In addition, the exception for corporate reorganizations embodied in Section 5.2.1.F.2 of the Water Charging Regulations was amended to apply only when the reorganization "does not affect ownership and/or control."

In spite of the 1994 amendment, some members of the Basin community have continued to interpret the language of the rule in a manner contrary to the Commission's consistent interpretation. To avoid further controversy, the Commission proposes a more thorough revision of the language, intended to remove any ambiguity.

In addition to defining "change in ownership and/or control" with much greater specificity, the proposed revisions also make clear that a merger at any tier in a corporate organization will extinguish a certificate held by a subsidiary in the same way as if the merger had occurred at the subsidiary level. Although the Commission has interpreted its rule this way in the past, the rules have never been explicit on this point.

The proposed amendments preserve and clarify the corporate reorganization exception contained in the current regulation. The Commission traditionally has not extinguished an entitlement in the case of an internal reorganization, and it does not propose a change in this practice.

The proposed amendments also preserve the existing exception for agricultural uses. Historically, agriculture has been treated differently than other uses. For purposes other than agriculture, an entitlement is issued to a user and would not be transferable to a different user, even if the use remained the same. In the case of agriculture, however, an entitlement effectively runs with the land, as long as the land remains in agriculture. The proposed amendments provide that an entitlement can be reissued to the successor of a holder of a certificate issued for agricultural water use, provided that the successor demonstrates that the water will continue to be used for agricultural irrigation purposes.

Dates

The public hearing on the proposed rule change will be held on Wednesday, December 7, 2005, at approximately 2:30 p.m. as part of the Commission's regularly scheduled business meeting. The time is approximate because the Commission will conduct hearings on several dockets (project approvals) beforehand, beginning at approximately 1:30 p.m.. The hearing will continue until all those who wish to testify are afforded an opportunity to do so. In the event that all those who wish to testify cannot be heard on December 7, the hearing will be

continued at a date, time and location to be announced by the Commission Chair that day. Persons wishing to testify at the hearing are asked to register in advance with the Commission Secretary by phoning (609) 883-9500, Ext. 224. Written comments will be accepted through Tuesday, January 10, 2006.

Addresses

The public hearing will be held in the Goddard Room at the Commission's office building, located at 25 State Police Drive in West Trenton, New Jersey. Directions to the Commission's office building are posted on the Commission's website at www.drbc.net. Written comments should be addressed to the Commission Secretary as follows: by e-mail to paula.schmitt@drbc.state.nj.us; by fax to the Commission Secretary, (609) 883-9522; by United States mail to the Commission Secretary, DRBC, P. O. Box 7360, West Trenton, NJ 08628-0360; or by overnight mail to the Commission Secretary, DRBC, 25 State Police Drive, West Trenton, NJ 08628-0360.

Additional Information, Contact

The full text of the proposed amendment and the text of the current regulation are posted on the Commission's website, www.drbc.net.

It is proposed to amend the *Basin Regulations—Water Supply Charges* as follows:

Sections 5.2.1.D through 5.2.1.F are proposed to be replaced with the following:

D. Limitations.

1. A certificate of entitlement is granted to a specific user for water withdrawals or diversions at a specific facility in the amount of the Legal Entitlement as defined in Section 5.1.3.B.

2. A certificate of entitlement shall not be applied, transferred or modified to apply to a facility other than the facility initially specified in the certificate.

3. A certificate of entitlement may not be transferred from the certificate holder to another user, except as provided in the Exceptions set forth in Section 5.2.1.F.

4. A certificate of entitlement does not exempt the certificate holder from paying water supply charges for any portion of water withdrawals or diversions used outside the facility specified in the certificate and any additional service area to which the facility supplied water as of October 27, 1961. For purposes of this Section 5.2.1.D.4, a certificate holder claiming an exemption from charges for water supplied within a service area shall submit proof satisfactory to the Commission identifying the facility's service area as of October 27, 1961. In the absence of proof of the service area as of October 27, 1961, the service area defined in the Commission docket, if any, for the facility in effect at the time the certificate was issued shall be deemed to be the facility's service area. In the absence of proof of a service area, the certificate shall only exempt the certificate holder from paying water supply charges for water used at the facility.

E. Termination of Certificate.

1. A certificate of entitlement terminates pursuant to this Section 5.2.1.E and without the need for Commission action if (i) the certificate holder dissolves or otherwise ceases to exist, (ii) the certificate holder ceases the withdrawals or diversions at the facility to which the certificate of entitlement applies for operational reasons including without limitation a shutdown of the facility for purposes other than maintenance or improvement, an abandonment of the intake without prompt replacement

or a change in process, (iii) the certificate holder through contract, lease or other agreement ceases to be the user or public water system supplier of the water withdrawn or diverted at the facility, (iv) the certificate holder changes the principal use of the facility or (v) there is a change in the ownership or control of the facility. Once terminated, a certificate of entitlement may not be reinstated or reissued.

2. A change in ownership or control of the facility includes, but is not limited to, any transaction, acquisition, merger or event (collectively "transaction") resulting in (i) a transfer of title to the facility, (ii) a person or entity or the shareholders or other owners of an entity becoming the beneficial owner, directly or indirectly, or acquiring alone or in concert the power or right to vote at least 20 percent of any class of ownership interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the transaction occurs, or (iii) a change of the de facto controlling interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the change occurs.

3. A change of the de facto controlling interest in an entity includes, but is not limited to, a change of the persons or entities with the ability or authority, expressed or reserved, to direct the management or policies of an entity and/or to take at least one of the following actions:

(i) amend or change the entity's identity;

(ii) appoint or remove at least 50% of the members of the Board of Directors or Trustees of a corporation, general partner of a partnership or a similar member of the governing body of an entity;

(iii) amend or change the by-laws, constitution, or other operating or management direction of the entity;

(iv) control the sale of, use of or access to any or all of the entity's assets;

(v) encumber the entity's assets by way of mortgage or other indebtedness;

(vi) control any or all of the assets or other property of the entity upon the sale or dissolution of the entity;

(vii) dissolve the entity;

(viii) arrange for the sale or transfer of the entity to a new ownership or control;

(ix) select or change the management of the entity or determine management compensation; or

(x) set operating policies, financial policies or budgets.

4. For purposes of applying the factors listed in Section 5.2.1.E.3, consideration may be given to circumstances particular to the person or entity and certificate holder involved, including without limitation the ability of that person or entity to take actions in light of the number of shares in the certificate holder or its parent entities that are actively voted, the practice of any majority shareholder in exercising or refraining from exercising majority rights, and any agreements giving the person or entity the right to control votes of others.

5. A series of transactions undertaken pursuant to a plan or that are otherwise related shall be considered a single transaction for purposes of this Section 5.2.1.E. For purposes of calculating the twenty percent threshold in Section 5.2.1.E.2(ii), the securities, shares or other interests held immediately prior to the transaction shall be added to the securities, shares or other interests acquired in the transaction. A transaction involving a change of the

de facto controlling interest within the meaning of Sections 5.2.1.E.2(iii) and E.3 shall constitute a change in ownership or control regardless whether or not the person or entity acquiring or transferring securities, shares or other interests owns at least twenty percent of the interests immediately before or after the transaction.

F. Exceptions.

1. Agricultural Exception.

(i) Whenever ownership or possession of land in agricultural use is transferred, any certificate of entitlement with respect to such land shall be deemed to run with the land, if but only if within sixty days following the land transfer the new user demonstrates to the Executive Director that it will continue to use the water withdrawn or diverted for agricultural irrigation. Following any such timely demonstration, the Executive Director shall transfer the certificate of entitlement to the new user. The Executive Director may extend the sixty day period for good cause shown.

(ii) A certificate of entitlement that has been transferred pursuant to Section 5.2.1.F.1(i) relieves the user of the obligation to pay water supply charges only with respect to the quantity of water in fact used by the new certificate holder for agricultural irrigation up to the Legal Entitlement specified in the certificate, and not with respect to the quantity of water used for any other purposes. The provisions of Section 5.3.3 shall apply to water uses outside the scope of the certificate of entitlement.

(iii) A certificate of entitlement that has been transferred pursuant to Section 5.2.1.F.1(i) terminates pursuant to this Section 5.2.1.F.1(iii) and without the need for Commission action if and when the certificate holder ceases using the water for agricultural irrigation, provided that if the cessation occurs in conjunction with a transfer of ownership or possession of the land in agricultural use, the certificate of entitlement may be transferred to a new user pursuant to Section 5.2.1.F.1(i). Once terminated, a certificate of entitlement may not be reinstated or reissued.

2. Corporate Reorganization Exceptions.

The following provisions apply where a corporate parent directly or indirectly owning 100% of each class of shares of all of its subsidiary corporations decides to reorganize those subsidiary corporations without affecting the corporate parent's 100% ownership interest.

(i) Whenever a corporate reorganization consists solely of a change of the name, identity, internal corporate structure, or place of organization of a corporate certificate holder, the Executive Director may reissue a certificate of entitlement in the name of the new owner of the facility, provided that the reorganization does not affect ownership and/or control by the certificate holder's corporate family of companies within the meaning of Sections 5.2.1.E.2, E.3, E.4 and E.5 and does not alter the corporate parent's 100% ownership interest.

(ii) A merger or other plan, transaction or series of transactions that effectuates a change of ownership or control within the meaning of Sections 5.2.1.E.2, E.3, E.4 and E.5 does not fall within the exemption of Section 5.2.1.F.2(i) on the basis that a corporate reorganization constitutes part of the merger, plan, transaction or series of transactions.

PAMELA M. BUSH,
Secretary

Fiscal Note: 68-47. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART V. DELAWARE RIVER BASIN COMMISSION

CHAPTER 901. GENERAL PROVISIONS

§ 901.2. Comprehensive Plan and water quality.

The Comprehensive Plan regulations as set forth in 18 CFR Part 401, Subpart A [(2001)] (2005) and the Water Code and Water Quality Standards as set forth in 18 CFR Part 410 [(2001)] (2005) are hereby incorporated by reference and made a part of this title.

§ 901.3. Water supply charges.

The Basin Regulations—Water Supply Charges as set forth in 18 CFR Part 420 [(1994)] (2005) are hereby incorporated by reference and made a part of this title.

[Pa B Doc No 05-2018 Filed for public inspection November 4, 2005, 9 00 a m]

DEPARTMENT OF REVENUE

[61 PA. CODE CH. 91]

Realty Transfer Tax Amendments

The Department of Revenue (Department), under authority in section 1107-C of the Tax Reform Code of 1971 (TRC) (72 P. S. § 8107-C), proposes to amend Chapter 91 (relating to Realty Transfer Tax) to read as set forth in Annex A.

Purpose of Proposed Rulemaking

The amendments to Chapter 91 are made to address numerous legislative changes and to bring the regulatory provisions into conformity with Departmental policy.

Explanation of Regulatory Requirements

Section 91.101 (relating to definitions) is amended by updating and adding several definitions in accordance with various legislative changes and court decisions. A summary of the amendments is as follows:

"Association" is amended to address a 1994 statutory amendment to 1 Pa.C.S. § 1991 (relating to definitions) and a 1997 statutory amendment to section 1101-C of the TRC (72 P. S. § 8101-C).

"Child" is added to address an issue raised in *Steidle v. Commonwealth*, 717 A.2d 1084 (Pa. Cmwlth. 1998).

"Conservancy" is added to address a 1989 statutory amendment to section 1102-C.3(18) of the TRC (72 P. S. § 8102-C.3(18)).

"Corporation" is added to address the 1994 statutory amendment to 15 Pa.C.S. § 8925 (relating to taxation of limited liability companies).

"Debt" and "financing transaction" are added for use in the regulations.

"Living trust" and "ordinary trust" are added to address the 1997 statutory amendment to section 1101-C of the TRC.